

Supreme Court, U.S.

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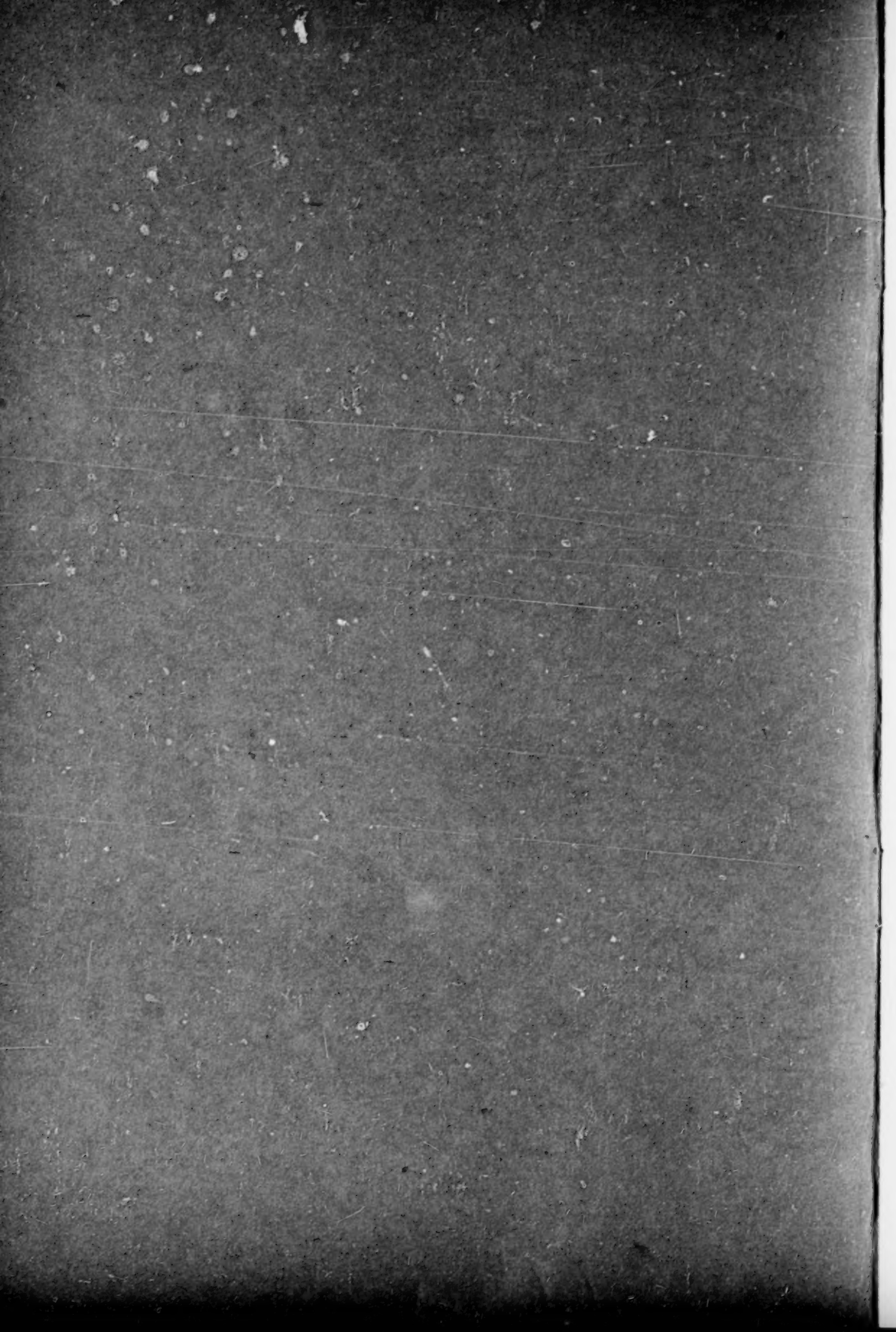
In The
Supreme Court of the United States
October Term, 1989

C.W. McPHERSON and NORMA J. McPHERSON,
Petitioners,
vs.

A.L. BARNES,
Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITIONER'S PETITION TO THE UNITED
STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT FOR
WRIT OF CERTIORARI**

TIMOTHY N. VUJNICH
Missouri Bar No. 25558
111 West Port Plaza
Suite 717
St. Louis, Missouri 63146
(314) 469-0420
Counsel for Respondent



QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Eighth Circuit properly find that Respondent Barnes had proven all of the elements of an action under Section 12(2) of the Securities Act of 1933, 15 U.S.C. 771(2), specifically reliance and causation, on the evidence presented in the trial at the District Court level?

2. Did the decision of the United States Court of Appeals for the Eighth Circuit Court improperly find Petitioner Norma J. McPherson a controlling person for purposes of Section 15 of the Securities Act of 1933, 15 U.S.C. 770, and Section 20 of the Securities Exchange Act of 1934, 15 U.S.C. 78t, based on the evidence presented in the trial at the District Court level?

3. Did the United States Court of Appeals for the Eighth Circuit improperly rule that Respondent's actions under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Missouri Uniform Securities Act, Chapter 409, RSMo 1986, were not time barred under the applicable statutes of limitation in light of the evidence presented at the District Court level and in the absence of express findings on this issue by the District Court?

4. Is the decision of United States Court of Appeals for the Eighth Circuit in error regarding the findings of the District Court regarding Count 20 of Respondent's complaint?

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STATEMENT OF THE CASE

This action arises out of three securities purchases made by A.L. Barnes in 1980 and 1981. On July 1, 1983, Barnes filed a twenty-one count complaint in the United States District Court for the Eastern District of Missouri against twelve defendants, including the McPhersons. The complaint alleged breach of employment contract, common-law fraud, a RICO violation, and violations of federal and Missouri state securities laws. The action was eventually settled against all defendants except the McPhersons.

After a bench trial, the District Court found per the Honorable Stephen J. Limbaugh, District Judge, in favor of the McPhersons. See Petitioners' Petition for Writ of Certiorari, (hereinafter referred to as "Petition"), Appendix A. Barnes appealed to the Court of Appeals for the Eighth Circuit, which affirmed the District Court's finding of no liability as to the first transaction, but reversed and remanded for further consideration with regard to the claims arising from the second and third transactions and the RICO claim ("*Barnes I*"). See Petition, Appendix B. On remand, the District Court found in favor of Barnes on the federal securities law violations and the state securities law violations. See Petition, Appendix C. The McPhersons then appealed to the Eighth Circuit Court of Appeals which affirmed the findings of the District Court ("*Barnes II*"). See Petition, Appendix D.

ARGUMENT

Supreme Court Rule 17 expressly provides that review on writ of certiorari is not a matter of right.

Rather, it is the matter of the exercise of judicial discretion. This Honorable Court has, on numerous occasions, made it clear that the exercise of this Court's discretion with respect to review on writ of certiorari is predicated on "the assumption that it [the Court] cannot function as an ordinary appellate court concerned with achieving individual justice in individual cases." 16 Wright & Miller, *Federal Practice and Procedure*, Section 4004 at page 507. See also *id.*, Section 4001 at page 491-92, n.12. Rule 17 thus reflects the basic premise that general public importance and the need to secure uniformity of federal law are the primary (although not exclusive) considerations in the exercise of discretion with respect to review on writ of certiorari. Respondent submits that the Petition for Writ of Certiorari filed by the Petitioners herein fails under Rule 17.1 to establish any valid reason for the exercise of the Court's discretion to grant review. While Petitioners' couch their Petition in language designed to evoke the considerations of Rule 17.1, close analysis betrays these statements as mere empty rhetoric.

Petitioners first suggest that the decision of the Eighth Circuit Court of Appeals regarding reliance and causation under Section 12(2) of the Securities Act of 1933, 15 U.S.C. 771(2), eliminated these elements from the burden of proof imposed on Respondent in proving a cause of action under Section 12(2) of the Securities Act of 1933. Petition, at page 3. Petitioners then later restate this issue as a conflict between the decisions of the Eighth Circuit in this case and decisions of this Court and the Fourth Circuit regarding the "manner of interpreting the effect to be given to presumption of reliance." Petition, at page 17-18. Petitioner similarly addresses this issue again

as one of a presumption of reliance and the evidence necessary to rebut a presumption of reliance. Petition, page 21-23.

However, not once do Petitioners point out how the two opinions of the Eighth Circuit panels that have previously heard this case conflict with prior decisions of this Court or the Fourth Circuit. Rather, Petitioners point to a conflict between the findings of fact of the District Court in its first opinion in this proceeding and the opinions of the Eighth Circuit in this proceeding. This is, of course, no surprise since the District Court below was reversed in *Barnes I* on the issue of reliance under Section 12(2) of the Securities Act of 1933, as well as under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10b-5.

Moreover, the Eight Circuit correctly applied the law under Section 12(2) of the 1933 Act. The Court did not require reliance to be proved under Section 12(2), since reliance is not an element of an action based upon Section 12(2). This is entirely consistent with the authorities. *Alton Box Board Company v. Goldman, Sachs and Company*, 570 F.2d 916, 924 (8th Cir. 1977); *Sanders v. John Nuveen & Company, Inc.*, 619 F.2d 108, 116 (10th Cir. 1959). Petitioners point to no contrary authorities. See Petition, Appendix B, page 81. The discussion regarding a presumption of reliance has no meaning in the context of Section 12(2) of the Securities Act of 1933.

Regarding causation as an element of an action under Section 12(2) of the Securities Act of 1933, the Eighth Circuit did in fact require that Barnes establish causation.

In reversing the District Court on this point in *Barnes I*, the Eighth Circuit indicated that the evidence adduced by Barnes was sufficient to establish a causal connection for purposes of Section 12(2) of the Securities Act of 1933. Petitioners' argument basically attacks this finding, stating that the Eighth Circuit wrongfully reversed the findings of the District Court. Simply, Petitioners argue that the factual findings of the District Court and the conclusions drawn therefrom were accurate, not those drawn by the Eighth Circuit. No conflict in decisions between the Eighth Circuit and other circuits or this Court is at issue. Petitioners are merely requesting this Honorable Court to review the record in this action for the purpose of determining whether or not the evidence supports the conclusions of the Eighth Circuit in *Barnes I*.

The same conclusion applies to Petitioners' arguments relating to the "controlling person" issue. Petitioners argue that the law applied by the Eighth Circuit in *Barnes II* conflicts not only with prior decisions of this Court, but also decisions of the Second, Third, and Ninth Circuits. See Petition, page 24. Petitioners even contend that the decision in *Barnes II* conflicts with the Eighth Circuit's decision in *Metge v. Baehler*, 762 F.2d 621 (8th Cir. 1985). Aside from these conclusory statements, Petitioners again fail to elaborate on the exact nature of the conflict.

The Eighth Circuit made it clear that it was applying the law in the Eighth Circuit as embodied in *Metge v. Baehler*, *supra*, and found that application of this case to the facts by the District Court did not involve clear error. Petition, Appendix D, page 121. Petitioners argue that the Eighth Circuit misapplied the law in finding that a person

can be deemed a controlling person by virtue of her status as an officer or director when there was no participation in corporate affairs. This statement betrays the basis for their argument, since the District Court and the Eighth Circuit both found that Mrs. McPherson did participate in corporate affairs for purposes of the test in *Metge v. Baehler*, supra. Again, Petitioners attempt to transform a disagreement over the findings of fact below into a conflict in the law applied by the Eighth Circuit.

The alleged conflict between the decision of the Eighth Circuit in *Barnes II* on the controlling person issue and the statutory language is illusory as well. The language in Section 15 of the Securities Act of 1933, 15 U.S.C. 77o, quoted by Petitioners in support of their argument that the statute requires as an element of an action thereunder proof of "knowledge of or reasonable grounds to believe in the existence of the facts" refers to the burden which must be met by Petitioners to sustain an affirmative defense under the statute. This argument simply lifts this phrase out of its statutory context in a blatant attempt to mislead this Court.

Regarding the statute of limitations defense, at the first trial in the District Court, substantial testimony was adduced by both parties regarding contract dates and discovery facts by Barnes. On remand to the District Court, the Petitioners were given a second opportunity to adduce any and all additional evidence on the issues relating to the case and refused to do so. Now Petitioners argue there was a factual dispute over several issues relating to the statute of limitations defense and they are entitled to have that dispute resolved by the District

Court, whose decisions in this proceeding implicitly rejected the defense.

It is abundantly clear with regard to the statute of limitations issue that Petitioners are not raising issues relating to uniformity among the circuits or consistency with decisions of this Honorable Court. No attempt is made to disguise this issue as the improper application of the law. Here, Petitioners simply disagree over the ultimate fact conclusions drawn by the Eighth Circuit. Petitioners should not be heard to complain before this Honorable Court that they were denied a fair hearing simply because the District Court implicitly and the Eighth Circuit explicitly and appropriately disagreed with them regarding the statute of limitations defense.

In the final analysis, Petitioners' arguments on this issue, like all others, do not raise an issue of law but a dispute over ultimate facts found in the case, which is clearly not within the preview of Supreme Court Rule 17.1.

Finally, regarding the error in the decision of the Eighth Circuit Court of Appeals with respect to Count 20 of Barnes' Complaint in this action, Petitioners' proper remedy is a motion to the Eighth Circuit Court Appeals, not a Petition for Writ of Certiorari. Mere housekeeping matters are clearly outside the preview of Rule 17.1.

CONCLUSION

For all of the foregoing reasons, Respondent Barnes submits that this action is not appropriate for review by this Honorable Court under the grant of a writ of certiorari. Therefore, Petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

TIMOTHY N. VUJNICH
Missouri Bar No. 25558
111 West Port Plaza
Suite 717
St. Louis, Missouri 63146
(314) 469-0420

Counsel for Respondent